



Houston, TX 77002-5005  
(713) 653-1700

**FOR DEFENDANTS:**

JAMES P. DENVIR, III  
AMY J. MAUSER  
BOIES, SCHILLER & FLEXNER, LLP  
5301 Wisconsin Avenue, Suite 800  
Washington, DC 20015  
(202) 237-2727

LEORA BEN-AMI  
THOMAS F. FLEMING  
KAYE SCHOLER, LLP  
425 Park Avenue  
New York, NY 10022  
(212) 836-7203

C. DAVID GOERISCH  
LEWIS, RICE & FINGERSH  
500 N. Broadway, Suite 2000  
St. Louis, MO 63102-2147  
(314) 444-7600

**COURTROOM CLERK:**

MARY GRACE BECKER

**REPORTED BY:**

DEBORAH A. KRIEGSHAUSER, FAPR, RMR, CRR  
Official Court Reporter  
United States District Court  
111 South Tenth Street, Third Floor  
St. Louis, MO 63102  
(314) 244-7449

1 (PROCEEDINGS BEGAN AT 9:00 AM.)

2 THE COURT: Good morning.

3 COUNSEL OF RECORD: Good morning, Your Honor.

4 THE COURT: Once more onto the breach we go.

5 *Monsanto Company and others versus E.I. DuPont and*  
6 *others; 4:09-CV-00686(ERW).*

7 The matter comes before the Court today on  
8 Plaintiffs', Monsanto Company and Monsanto Technology, LLC's,  
9 Motion to Stay Discovery and for Separate Trial of Defendants'  
10 Antitrust Counterclaims, Document No. 35.

11 In their motion, Plaintiffs ask that the Court stay  
12 discovery on the antitrust counterclaims filed by Defendants  
13 until resolution of Plaintiffs' patent and contract claims.  
14 Additionally, Plaintiffs ask that the antitrust counterclaims  
15 be tried separately.

16 Plaintiffs state that it is common practice for  
17 Courts to sever antitrust claims and patent claims to simplify  
18 issues and reduce the risk of jury confusion. Plaintiffs note  
19 that patent claims are less complex and require less discovery  
20 and will be ready for trial earlier. Plaintiffs state that  
21 the antitrust counterclaims depend upon issues at the core of  
22 the patent claims and resolving the patent claims first will  
23 moot or simplify the antitrust counterclaims.

24 Defendants respond that granting this motion would  
25 substantially delay the resolution of this case and assert

1     that Plaintiffs' current actions to extend its monopoly power  
2     require an expedited briefing and trial schedule on these  
3     counterclaims. Defendants state that many of their antitrust  
4     counterclaims are not dependent on Plaintiffs' patent claims  
5     and assert that the law does not support a stay where patent  
6     claims would not be dispositive of all of the antitrust  
7     claims.

8             Plaintiffs reply that the vast majority of  
9     Defendants' antitrust counterclaims would be mooted by the  
10    resolution of their contract and patent claims and state that  
11    Courts frequently stay discovery even where resolution of the  
12    patent claims will not dispose of all antitrust counterclaims.

13            Plaintiffs ready?

14            MR. CONRAN: Good morning, Your Honor.

15            THE COURT: Good morning. Plaintiffs ready?

16            MR. CONRAN: We're ready.

17            THE COURT: Defendants ready?

18            MR. DENVIR: We are, Your Honor.

19            THE COURT: Good morning. Whenever you're ready.

20            MR. CONRAN: I'd like to introduce to the Court  
21    Dan Webb, a good friend, who is going to be handling the  
22    motion on this issue. All right?

23            THE COURT: All right. Good morning, Mr. Webb.

24            MR. WEBB: Good morning, Your Honor. Thank you for  
25    allowing me to appear and argue this motion.

1           Let me maybe start with a general observation or  
2 point that this issue that we're arguing today on behalf of  
3 Monsanto of staying an antitrust counterclaim that gets filed  
4 following a patent case being filed is an issue that's been  
5 frequently handled by Courts in recent years, and it's because  
6 this pattern repeats itself. When a patent case gets filed by  
7 a patent holder, it's quite common and frequent that, as a  
8 strategy, there's an antitrust counterclaim that gets filed by  
9 the -- by the defendant for a variety of reasons. And so  
10 Courts have addressed this issue a lot over the years.

11           When you look at the most recent cases, these cases  
12 and now in recent years come out and directly say that it has  
13 become a standard practice or a common practice for Federal  
14 Courts to stay antitrust counterclaims pending resolution of  
15 -- of the patent claims. The Federal Courts have moved in  
16 this direction in recent years, Your Honor, because it just  
17 makes good common sense to do so for three reasons. If you  
18 read those -- There's a lot of -- I think there's about 25  
19 cases the parties cite between the two briefs on this issue,  
20 but when you break down those cases, what I see in the cases,  
21 Your Honor, there's essentially three reasons that in one form  
22 or another get referred to in the cases as being the reason  
23 why the Court has decided to stay discovery and to separate  
24 the trials.

25           Probably the most important reason, the one that

1 seems to get referred to the most is that resolution of the  
2 patent claims first may moot some number of the antitrust  
3 counterclaims or at least simplify and to streamline the  
4 antitrust counterclaims. That's basically a judicial  
5 efficiency argument that the cases focus on, but there's two  
6 other reasons that get often mentioned and discussed in the  
7 cases that are really related to that.

8           The second is that the fact is it's quite common that  
9 those antitrust counterclaims are so much more complex,  
10 involve so much more discovery; that from the standpoint of --  
11 of judicial economy, that Courts focus on that and decide that  
12 it's better to let these patent cases get tried first because  
13 what happens in the real world is that that almost always  
14 narrows down the antitrust counterclaim and, quite frankly,  
15 frequently it goes away. And, therefore, as the Supreme Court  
16 has recently said in the *Trombley* case, the cost of discovery  
17 and the time consumption with discovery, if it can be  
18 reasonably avoided, then that's something the Court should  
19 focus on which is why I think these cases in recent years have  
20 focused more on that second issue, along with the first issue.

21           The third issue that gets focused on in the cases and  
22 why they grant the motion is jury confusion. What the Courts  
23 analyze and say is that if you just crunch the patent case and  
24 throw on top of it, glob on top of it all of these antitrust  
25 issues, it's inevitable that you're going to create a great

1 deal of jury confusion and -- and cloud the focus of the  
2 patent case.

3 And so those three reasons I want to talk about here  
4 today with Your Honor because all three of those reasons that  
5 are present in the case are present in the circumstance before  
6 Your Honor with this case. And by the way, as far as how  
7 common it is, the cases say it's become the common practice, I  
8 actually counted it up. So I looked at the briefs.

9 On the issue of whether there should be a separate  
10 trial, the parties have cited 23 cases between the two briefs.  
11 Now I did the best I could to look at those 23 cases. It  
12 looks to me like 18 of those cases -- Twenty-three of those  
13 cases said they wanted a separation of trials. On that issue,  
14 18 of those cases granted the separate trial issue. And so I  
15 think that supports at least what the Courts are observing in  
16 their opinions that it's become the common practice in these  
17 motions.

18 As far as staying discovery, the parties appear to me  
19 to cite 19 cases between their two briefs, and 11 of those  
20 cases stayed discovery. And so I do think it has become the  
21 common practice, and all three reasons are present here. Let  
22 me go through them one at a time, if I might, for Your Honor,  
23 the basic issue of whether or not the resolution of the patent  
24 case first could have a significant effect on mooted out the  
25 antitrust counterclaims or simplify the issues in that case.

1           Your Honor in your preliminary comments touched upon  
2     the first issue that is presented there; is that the Courts  
3     have addressed how much mootness might be -- result from  
4     trying the patent issues first. And the Plaintiffs, for  
5     example, say it needs to all be moot when all the dust is  
6     settled. And, Your Honor, there is no case that I could find  
7     that actually says that.

8           The standard seems to me, as I read the cases, that  
9     the basic standard is the Court's focus on whether there's a  
10    reasonable likelihood that some of the antitrust issues are  
11    going to get mooted out or it's going to get simplified in a  
12    significant way. One of the cases I'm just going to read a  
13    quote from because it kind of said it better than what I'm  
14    saying. In the *Dentsply* case which is the District of  
15    Delaware by Judge Robson, the Court pointed out the argument  
16    that, "All of the antitrust issues must be resolved in the  
17    first trial." That's the patent trial. That misapprehends  
18    the goal of bifurcation because separate trials may be  
19    warranted so long as some of the issues in the second trial  
20    would be simplified. All of the issues in a second trial may  
21    not be implicated in the first trial. I think, as I read the  
22    cases, that's the standard that seems to have emerged; that  
23    you would need to conclude that you see that some of the  
24    issues in that antitrust counterclaim are going to be  
25    simplified or actually going to be moot because of what is

1 going to happen in the patent case.

2 Now if you look at the Complaint here, Your Honor,  
3 I -- I put a chart together that I'm going to hand up to  
4 Your Honor because there are eight different forms of  
5 anticompetitive conduct that get discussed in this Complaint,  
6 the antitrust counterclaim Complaint. So what I've done,  
7 Your Honor, is I have prepared a chart. If I could, could I  
8 ask leave to hand this to Your Honor?

9 THE COURT: Sure.

10 MR. WEBB: Thank you. What I'm trying to address is  
11 the mootness question. What is it that could very likely end  
12 up being moot if you try the patent case first?

13 And so the first column, I've got the eight  
14 categories of anti -- or forms of anticompetitive conduct that  
15 appears to me the Plaintiff is alleging in the antitrust  
16 counterclaim.

17 The second column addresses how I at least think or  
18 we think that it -- the allegations in the -- in the antitrust  
19 case may very well be resolved because of what happens in the  
20 first trial, in the patent trial.

21 And the third column, I've tried to pinpoint from the  
22 briefs whether I think the parties have any great dispute  
23 about this. And so let me quickly walk through this, but the  
24 bottom line is that six -- six out of the eight antitrust  
25 forms of anticompetitive conduct are going to be significantly

1 impacted and I believe mooted by what happens one way or the  
2 other in the patent case. And six out of eight is obviously a  
3 lot more than some. It's a large majority, and I respectfully  
4 suggest that in and of itself would lead to granting our  
5 motion.

6 The issue -- I'll quickly go through them. The issue  
7 about patent fraud, I don't think there's any question that  
8 that issue is going to get resolved in the -- in the -- in the  
9 patent case and is going to end up being moot one way or the  
10 other. That issue is not going to get relitigated in the --  
11 in the underlying antitrust case. But -- And the Federal  
12 Circuit, by the way, has made clear that once these issues get  
13 resolved in the patent case, they do become, if you will, law  
14 of the case or collateral estoppel. We're not going to be  
15 relitigating the issues that get resolved in the patent case  
16 in the antitrust case which is what brings the judicial  
17 economy or judicial efficiency. So patent fraud is going to  
18 be mooted.

19 Sham litigation is clearly going to be mooted one way  
20 or the other by -- by what happens in the patent trial.

21 False statements, the false statement so-called  
22 antitrust misconduct, that we misrepresented our patent  
23 position to seed companies, that's going to get resolved in  
24 the patent case because it turns out one way or the other  
25 that's going to have a significant mootness effect on the

1 false statements formed of antitrust anticompetitive conduct.

2 No. 4: The "poison pill" provision basically is a  
3 provision that allows Monsanto, if there's a change of  
4 ownership by its licensee, they can terminate the license  
5 because Monsanto has a right to know who owns its License  
6 Agreements. There's no question that that "poison pill"  
7 provision is what under the law is called a field-of-use  
8 restriction which, in effect, gets resolved once you know the  
9 scope of the patent, and that's going to get litigated by  
10 Your Honor in the patent trial. And so the field-of-use  
11 restriction is also going to end up being mooted or  
12 significantly affected.

13 Now I don't -- I don't think the Defendants agree  
14 with me on that point, so I point that out in the third  
15 column, although I don't see any real argument in their brief  
16 as to why.

17 The stacking restrictions, No. 5, there's no dispute  
18 on this. That's another field-of-use restriction on whether  
19 or not our License Agreement, which -- which restricts  
20 stacking of Monsanto's Roundup® Ready trait with any other  
21 alternative glyphosate-tolerant trait, that also is a  
22 field-of-use restriction that's going to get resolved once the  
23 scope of the patent gets resolved in the patent trial.

24 No. 6, the Dow-Monsanto Agreement, both sides agree  
25 that issue will still -- will not get mooted out by the patent

1 trial because that's an agreement actually between -- that  
2 Monsanto had with Dow. And there's all kinds of issues about  
3 standing there, but I'm not going there today. I'm just --  
4 That point is we agree that that issue will still be there in  
5 the antitrust case.

6 And the Germplasm License Provisions, this is another  
7 field-of-use issue which is going to get resolved with the  
8 determination of the scope of Monsanto's patent rights, and  
9 it's going to get resolved in the patent case.

10 The switching strategy, we agree the switching  
11 strategy, that Defendants allege a form of anticompetitive  
12 conduct, will not get resolved in the patent case. But you've  
13 got six out of eight of these antitrust forms of misconduct  
14 that are going to be mooted or substantially affected or  
15 streamlined. And, therefore, I think the first factor that  
16 the Courts really focus on, which is judicial economy, is  
17 clearly present and supports the motion that we filed here.

18 The second -- The second issue -- I'm sorry,  
19 Your Honor.

20 THE COURT: Yeah. I just wanted to inject here for a  
21 moment.

22 MR. WEBB: Yes.

23 THE COURT: Of course, the Defendants take a large  
24 part of their brief to discuss No. 8, and it's their view that  
25 what this is all about is delaying the disposition of their

1 antitrust claims to permit the -- what they claim unlawful  
2 activity of Monsanto to continue, and I'm sure I'll be hearing  
3 a lot more about that in a moment. But do you want to touch  
4 upon that now or wait for rebuttal until you hear what they  
5 have to say?

6 MR. WEBB: No. I'll touch -- If you want, I'll touch  
7 on it now --

8 THE COURT: All right.

9 MR. WEBB: -- and then I'll address it more in detail  
10 in rebuttal.

11 THE COURT: All right.

12 MR. WEBB: But let me just make this basic point.  
13 That's a -- That's a prejudice argument. They've raised an  
14 issue that they will be prejudiced if they don't get this  
15 antitrust case to trial sooner rather than later, and the  
16 stay, when they -- whether the stay will somehow hurt the  
17 marketplace. And that prejudice argument, if you look at the  
18 cases, the prejudice argument is not valid if the Plaintiff --  
19 if in this case the Defendant has sat on their rights. These  
20 Licensing Agreements that have these restrictions in it and  
21 the issues that they're raising, they've been part -- they've  
22 been part of the License Agreement for the seed companies  
23 going back to 1996 and 1997, and they've been -- So the idea  
24 that the Plaintiff is going to be prejudiced by, let's say, a  
25 year delay in getting the antitrust case to trial I

1 respectfully suggest is not a valid reason. Plaintiffs or  
2 Defendants raise this -- The counterclaim plaintiff always  
3 raises this, saying, "Oh, we have to get to trial sooner on  
4 our underlying -- on our underlying antitrust claim because of  
5 the market." But most of the time, the Courts don't grant it  
6 for that reason, for the reason I just -- The Plaintiff here  
7 has sat on these Licensing Agreements for the seed companies  
8 and its own Licensing Agreement for years and has never  
9 brought an antitrust claim until all of a sudden the patent  
10 claim gets brought. And I'll address it more later, but I  
11 think under the case law, they are not suffering any prejudice  
12 because of their own conduct.

13 THE COURT: I think the record needs to say -- You  
14 said "Plaintiffs sat on it." You mean Defendants sat on it.

15 MR. WEBB: I did. I should have -- Thank you.  
16 They're the Defendants who have filed the counterclaim on the  
17 antitrust counterclaim. Thank you, Your Honor.

18 So they've sat on their rights, and I don't think  
19 there's any prejudice.

20 Now the second reason that the cases grant the stay  
21 and the separate trial is a focus, I think, primarily on  
22 discovery which is that if -- if it turns out that the  
23 antitrust claims truly are much more complex than the patent  
24 claims, and there's some likelihood that they may get  
25 streamlined, mooted out or just go away because the patent

1 case gets resolved first, then you got this issue of a huge  
2 amount of cost and time consumption in discovery that can be  
3 saved which is, obviously, something the Courts are heavily  
4 focused on today with the heavy increase in discovery costs.

5 THE COURT: Let me interrupt you again.

6 It is -- Even with the multi-national companies,  
7 certainly, the thought of costs, I think, is -- to me is less  
8 significant than if you have an enormous company on one side  
9 and a very small company on the other side that could  
10 effectively be put out of business with these kinds of costs.  
11 But how -- how really is the cost of discovery saved if you  
12 have to do it twice?

13 It seems to me that it's -- it's -- that argument  
14 sort of pales when you look at the overall picture because a  
15 lot of these same witnesses are going to be deposed repeatedly  
16 if -- if the Motion to Stay is granted, I think.

17 MR. WEBB: Well, Your Honor, respectfully I don't  
18 think that's what's going to happen. Let me just address that  
19 because if you look at what has happened historically, that  
20 once the patent case gets tried, those issues that actually  
21 get mooted out in the patent case, the parties are not allowed  
22 to relitigate those issues in the antitrust case. And so the  
23 antitrust discovery will not go through the same discovery.  
24 It will not be repeated twice because of the mootness issue.  
25 Once -- Once the patent issues become the law of the case and

1 they're resolved and then you -- after the dust settles, you  
2 figure out what's actually left in the antitrust case -- For  
3 example, if the only discovery that got taken in the antitrust  
4 case were on the -- let's say on Dow, on the Dow contract or  
5 on the switching strategy, if that's all that was left, that  
6 amount of discovery would be so small compared to the amount  
7 of discovery that would take place if we just litigated all of  
8 the antitrust issues in the patent case and took discovery.

9 And just to have a visual, something I can show  
10 Your Honor on that, let me hand up another chart that relates  
11 to Your Honor's question.

12 The -- What I've tried to do on this chart is to kind  
13 of look at the briefs and the Complaint and in effect show the  
14 Court that if you -- if you don't take discovery of the  
15 antitrust case and the patent case, the discovery in the  
16 patent case will essentially address the issues in that  
17 left-hand column which are very focused. They're narrow and  
18 they're the issues that will -- that get litigated in a patent  
19 case or in a breach of contract case involving with the patent  
20 the validity of the patent, the enforceability and  
21 infringement. Those are pretty narrow, straightforward issues  
22 that will get discovered and will get addressed.

23 In the right-hand column are the issues that are  
24 presented by this massive antitrust case. And it is massive,  
25 Your Honor. For example, just under the issue of Market

1 Definition and Market Power as I've set forth in the  
2 right-hand column, the fact is that we -- we don't have one or  
3 two alleged relevant markets. There are five proposed  
4 relevant trait product markets. When I've tried antitrust  
5 cases with one or two markets, it becomes massive. I don't  
6 even know with five -- five different trait markets, and the  
7 issue about what is the -- the definition of what is in those  
8 markets to the testimony of experts and economists, the  
9 existence of whether or not there's market power within each  
10 of those five relevant markets, Your Honor, that issue in and  
11 of itself will be an enormous amount of discovery which if it  
12 doesn't -- if it gets delayed until you see when the dust  
13 settles, that issue could very well be reduced down to a much  
14 smaller number of markets that we're dealing with.

15           The alleged anticompetitive conduct, which I just  
16 went through with Your Honor to some extent, there's eight  
17 different forms of it. A lot of those forms of  
18 anticompetitive conduct I think are going to be mooted out by  
19 the resolution of the patent case. And -- And so that, again,  
20 we don't know what's going to happen in the patent case, and  
21 when the Courts tend to rule on these motions, they're trying  
22 to look a little bit into a crystal ball and take a reasonable  
23 approach, but I think that the eight -- eight different forms  
24 of anticompetitive conduct in which I think six of the eight  
25 are going to be mooted out and we're not going to take

1 discovery on those six forms of anticompetitive conduct after  
2 the patent case is resolved.

3 Also, antitrust injury or anticompetitive effect is  
4 also a major issue that gets addressed by experts and is a big  
5 issue dealing with five different relevant markets. And then,  
6 of course, there's antitrust damages. And so what I have in  
7 the right-hand column is discovery which I believe very likely  
8 is going to be substantially reduced. And so I think there's  
9 going to be -- I don't think it's going to happen twice, and I  
10 don't think we're going to litigate the issues twice, and I  
11 think there's going to be an enormous amount of judicial  
12 efficiency and an enormous cost savings. And, yes, Your Honor  
13 is correct. I accept you got two major companies here, and I  
14 don't minimize Your Honor's point, but I would say the Supreme  
15 Court in the recent *Trombley* case at least pointed out that  
16 it's important that whether it's a big company or a little  
17 company, if discovery in some way can -- there's an obvious  
18 potential cost savings, Courts ought to at least look at that  
19 issue, and I would just respectfully say that when you read  
20 these cases over, Courts do seem to look at that issue.

21 Now the ---

22 THE COURT: One point. I may not have allowed enough  
23 time for argument, and so I don't want to ---

24 MR. WEBB: Yes.

25 THE COURT: We have another big case coming at

1 10:00, --

2 MR. WEBB: Yes.

3 THE COURT: -- so just proceed accordingly.

4 MR. WEBB: I'm moving right along. Thank you.

5 THE COURT: All right.

6 MR. WEBB: I did not realize -- I'm moving.

7 THE COURT: All right.

8 MR. WEBB: Let me go to the third reason, Your Honor.

9 The third reason is that trying the patent contract  
10 case together with the antitrust counterclaims is likely to  
11 create significant jury confusion. This is an issue that the  
12 Courts really focus on in these Motions to Stay or for  
13 separate trials. And it's done so because you can just  
14 imagine, Your Honor, if you took the simple issues I put on  
15 this side of the chart, the patent case, and just threw on top  
16 of it this massive amount of evidence, the potential for jury  
17 confusion, to get lost and lose the focus on the patent and  
18 breach of contract. I will quote from that same case very  
19 quickly in *Dentsply* where Judge Robson said, "The Court would  
20 be left numb -- The Jury -- The Jury would be left numb and  
21 bewildered if asked to consider the patent and antitrust  
22 issues together which would include intricate, factual and  
23 economic analysis regarding relevant market, actual and  
24 potential shares of that market, barriers of entry,  
25 et cetera."

1           And so, Your Honor, that issue, I don't think there's  
2 any question that if you took all of these antitrust issues  
3 and just lobbed them on top here, that that is a major issue  
4 that I think supports our motion.

5           Therefore, Your Honor, I would just conclude by  
6 making this one observation. In a case a few years ago,  
7 DuPont happened to be on the other side of the fence than they  
8 are today. In that case, they, in a case called *Akznoa v.*  
9 *DuPont*, DuPont ended up having, in effect, had a patent claim  
10 for infringement and then they picked up the inevitable  
11 antitrust counterclaim. And they went forward on that case in  
12 front of a District Court Judge in Delaware, and they raised  
13 the -- every issue I just raised before Your Honor. And they  
14 argued that they should get a stay of discovery and they  
15 should get a separation of trials, and they got it. The Court  
16 granted it on the very issues I've raised because of --  
17 because most, but not all, of the antitrust claims potentially  
18 were mooted because there was going to be jury confusion  
19 likely and because of burdensome discovery. And so somewhat  
20 ironically, at least DuPont in another case has found that the  
21 principles I've set forth here seem to be particularly  
22 relevant.

23           Thank you, Your Honor.

24           THE COURT: Thank you, Mr. Webb. Thank you.

25           MR. DENVIR: Thank you, Your Honor.

1 THE COURT: Good morning.

2 MR. DENVIR: Your Honor, I, too, have some  
3 demonstratives to hand up, --

4 THE COURT: All right, good.

5 MR. DENVIR: -- if it's okay with you.

6 THE COURT: Thank you.

7 MR. DENVIR: Your Honor, Jim Denvir for Defendants.  
8 Good morning.

9 THE COURT: Good morning.

10 MR. DENVIR: A couple of points I'd like to respond  
11 to right away, Your Honor. We acknowledge that the cases go  
12 both ways, and I think if we were to count the cases, we'd  
13 probably come up with a slightly different breakdown.

14 But what I think -- what I think happens in these  
15 cases is that Courts do try to use their common sense and  
16 reach the most efficient outcome given the facts before them.  
17 And we would suggest, Your Honor, that in this case all of  
18 the -- all of the factors that were just discussed weigh not  
19 in favor of stay and bifurcation but in favor of going forward  
20 to a single trial of all of these issues. And I think,  
21 Your Honor, that's effectively what the cases say.

22 Now counsel for Monsanto, Your Honor, specifically  
23 mentioned the *Dentsply* case as one that's worth looking at,  
24 and I think he read a quote to you from the case. I would  
25 like to read you a couple of other quotes from that case. The

1 cite is 1996 Westlaw 756766. That's a District of Delaware  
2 case, 1996. The Court did order separate trials in that case.  
3 However -- And this is a quote. It stated that, quote,  
4 "There's a possibility that all aspects of the antitrust  
5 claims, including the two nonsham allegations, could be  
6 resolved by a first trial on patent infringement."

7           So, Your Honor, I would suggest that even the  
8 *Dentsply* case involved a situation in which all of the  
9 antitrust claims could be mooted by a determination in favor  
10 of the plaintiffs in that case. That Court also observed,  
11 quote, "A stay of discovery on antitrust issues would most  
12 likely devolve into a series of time-consuming and expensive  
13 discovery disputes as to whether particular discovery is  
14 directed at the patent or antitrust claims. Efficiency  
15 dictates that discovery on all claims, including the antitrust  
16 counterclaims, continue apace."

17           Now, Your Honor, we're going to start, I think, with  
18 three reasons of our own why this case should -- should go  
19 forward.

20           First is that -- And this is sort of coming at it  
21 from the other end. We believe, Your Honor, that there's --  
22 there's actually no very good reason that the Court has to  
23 decide now whether to bifurcate the trial of this case. We've  
24 got a long way ahead of us, including possible Motions for  
25 Summary Judgment, and a lot of things can happen between now

1 and the final pretrial conference. But what I would  
2 respectfully suggest to Your Honor is that it is extremely  
3 important that the Court at least leave its options open with  
4 respect to whether there is a single trial or a bifurcated  
5 trial, so the antitrust and patent claims, and that's for the  
6 reason that we've already discussed in our papers, Your Honor;  
7 that antitrust plaintiffs -- There's a -- There's a standard  
8 in antitrust law that antitrust plaintiffs should be given the  
9 opportunity to have the jury consider their evidence as an  
10 integrated whole and not segmented or considered piecemeal.  
11 So in order to preserve that option by Your Honor, we have to  
12 allow discovery on all -- on all issues because if the Court  
13 decides to stay discovery, then that option is off the table.

14 The second reason, Your Honor, that we think this  
15 case needs to go forward on all claims is the -- is the  
16 judicial economy and efficiency argument that was just raised  
17 before Your Honor.

18 And third, Your Honor, if -- if this case is stayed,  
19 there will be very real prejudice, and I'd like to address all  
20 of those points.

21 The first numbered page, Your Honor, in that set of  
22 demonstratives that I handed up, which I think is probably --  
23 it's the page after the Table of Contents, this is sort of our  
24 own competing chart. I think we're going to have -- we're  
25 having a war of charts in this case.

1           The categories here are the categories that the  
2   Plaintiffs are using in this case. They come from Pages 7 and  
3   8 of their reply brief. They're exactly the same categories;  
4   (1) Patent Fraud, (2) Sham Litigation. The Paragraphs of  
5   Amended Counterclaims that are cited there are also the  
6   paragraphs that are listed in Defendants' reply brief.

7           So we've looked at this in a slightly different way,  
8   Your Honor. And let's start where -- where there's no  
9   disagreement, and that is with respect to this patent fraud  
10   issue.

11           Neither side contends otherwise. It is a fact,  
12   Your Honor, that discovery as to that claim, which is sort of  
13   the flip side of the inequitable conduct affirmative defense,  
14   is going to go forward because the facts underlying both the  
15   affirmative defense and the affirmative antitrust counterclaim  
16   are the same. They involve issues surrounding Monsanto's  
17   conduct before the Patent Office. They involve material which  
18   we allege was withheld. They involve issues concerning the  
19   materiality of that information. They involve issues  
20   concerning Monsanto's intent in withholding that information.  
21   And discovery as to all of those issues will take place,  
22   Your Honor, regardless of -- Well, they're going to take place  
23   because they have to take place. It's our -- Inequitable  
24   conduct is our affirmative defense, and the facts underlying  
25   that affirmative defense are the same as the facts underlying

1 our affirmative *Walker Process* claim.

2           These factual allegations, Your Honor, which account  
3 for 49 of the 104 of the allegations of anticompetitive  
4 conduct in the case, are, in fact, the most factually complex,  
5 discovery-intensive disputed facts in this litigation.  
6 Everything else will pale in comparison to the complexity and  
7 the difficulty of that discovery, and that's going to take  
8 place no matter what.

9           Now we enter, again using Monsanto's categories,  
10 categories of Anticompetitive Conduct as to which there is no  
11 dispute that discovery will eventually be necessary at some  
12 point. So, again, we have patent fraud which we just  
13 discussed; the sham litigation which we just discussed; the  
14 Dow-Monsanto agreement. That's an additional 14 out of the  
15 104 allegations of fact and the switching strategy which is  
16 another 7 out of the 104. So that's 70 out of the 104  
17 allegations, Your Honor, as to which discovery is going to  
18 take place no matter what happens. It's just a question of  
19 when.

20           Now you'll note in the middle column opposite  
21 "Switching Strategy" that we put in parentheses "excluding  
22 Paragraphs 137 to 143," and we've noted that because Monsanto  
23 doesn't count those paragraphs anywhere. What those  
24 paragraphs involve, Your Honor, ---

25           THE COURT: Just a second. Where are you now?

1           MR. DENVIR: I'm sorry. "Eventual Discovery  
2 Necessary - Undisputed."

3           THE COURT: All right.

4           MR. DENVIR: And if you look down to "Switching  
5 Strategy," the paragraphs of the counterclaims that have been  
6 identified by Monsanto, 179 through 185, do not include, nor  
7 does any other category in Monsanto's chart, include  
8 Paragraphs 137 to 143. And I just wanted to tell you what --  
9 Those paragraphs are the paragraphs that allege that the  
10 independent seed companies are a critical, essential,  
11 necessary distribution channel for developers of traits. That  
12 is a key -- Those are key sets of allegations, Your Honor, in  
13 antitrust terms, and Monsanto concedes that those have to go  
14 forward as well. So we're really talking about 77 out of the  
15 104 paragraphs of the counterclaims that allege  
16 anticompetitive conduct as to which discovery will be  
17 necessary at some point.

18           Now when you talk about efficiency, Your Honor,  
19 "efficiency" means potentially avoiding unnecessary discovery.  
20 It does not mean delaying discovery that's going to happen no  
21 matter what, and that's essentially what Monsanto is arguing  
22 for here today.

23           We then have the final category, Your Honor,  
24 "Discovery Necessary," but it's our position that Monsanto  
25 disputes that, and that includes the remainder of those -- of

1 those categories of anticompetitive conduct.

2 Now the reason we disagree with Monsanto's position,  
3 Your Honor, that discovery will not be necessary with respect  
4 to those claims is that they are all part of our allegations  
5 of the switching strategy. If you look at the next page,  
6 Your Honor, we tried to demonstrate this graphically.

7 When Monsanto refers to the "ISC switching strategy,"  
8 they suggest, I think, Your Honor, that these are some  
9 isolated, disconnected sort of allegations that we just threw  
10 in the Complaint. As a matter of fact, Your Honor, the  
11 Complaint says that we bring this action -- that's in the  
12 yellow box on top -- "DuPont and Pioneer bring this action to  
13 arrest a new anticompetitive scheme by Monsanto designed to  
14 force ISCs to switch from Roundup Ready® 1 to Roundup Ready® 2  
15 Yield prior to the expiration of the patents." So it's not  
16 some isolated, off-to-the-side set of allegations. This is  
17 the centerpiece of our case.

18 It is then alleged, Your Honor, in Paragraph 3 of the  
19 counterclaims, "The unlawful scheme described herein" --  
20 that's the switching scheme -- "has five key related  
21 components each by itself anticompetitive and each  
22 contributing to the exclusionary effects of the whole."

23 And what are those five? They're the five categories  
24 of anticompetitive conduct that Monsanto says, "Well, these  
25 are field-of-use restrictions," so the Court need not -- If we

1    went on -- if we went on the patents then, the Court will  
2    never need to consider these issues, but we disagree with  
3    that.  We think, Your Honor, the discovery will be necessary  
4    as to those parts of an overall -- overarching scheme,  
5    regardless of the outcome on the patent issues.

6               Now we address that on the next page of this -- these  
7    demonstratives, Your Honor.

8               We respectfully submit, Your Honor, that the  
9    switching strategy cannot be viewed in isolation from its  
10   various components, and those components are the five  
11   categories as to which Monsanto claims discovery will not be  
12   necessary.

13              It has long been held that even if individual  
14   elements of an alleged anticompetitive scheme are legal, taken  
15   outside of the context of monopoly power and taken outside of  
16   the context of the synergistic effects of that scheme, that if  
17   there are effects taken as a whole that are exclusionary  
18   within the meaning of Section 2 of the Sherman Act, then they  
19   violate Section 2, taken as a whole, even if individually,  
20   each of those -- each of those acts viewed in isolation might  
21   be legal.

22              Our Complaint -- Our counterclaims, Your Honor,  
23   allege that you can't view these -- these acts in isolation  
24   here.  The Complaint alleges that they are all part of a  
25   scheme; that they're interrelated and that they operate

1 synergistically. So we would submit, Your Honor, that no  
2 matter what the outcome on the patent case is, on the patent  
3 case we're going to have to take discovery on these five  
4 remaining categories as well which means virtually a hundred  
5 percent.

6 I want to make one comment. We've heard today and in  
7 the briefing that's been done in this case the term "field of  
8 use" as sort of a callusment (ph); if it's -- if it's a -- if  
9 it's a field of use, then it's somehow blessed and no longer  
10 subject to antitrust scrutiny. Well, it's not quite that  
11 simple. Number one, we will dispute whether these are  
12 actually field-of-use restrictions or not. But, second, even  
13 if they are, the Federal Circuit in *B. Braun*, B-R-A-U-N,  
14 *Medical v. Abbott Labs*, which is at 124 F3d 1419 at 1426,  
15 Federal Circuit case, stated that field-of-use restrictions  
16 are generally upheld. It then went on to note, however, that  
17 quote, "Any anticompetitive effects they may have are analyzed  
18 under the rule of reason," closed quote.

19 So we will -- we will argue during the course of this  
20 case, Your Honor, that these are -- number one, these are not  
21 field-of-use restrictions and, number two, even if they are,  
22 they -- they have to be evaluated under the rule of reason.  
23 And third, they cannot be viewed in isolation. They have to  
24 be viewed as an integrated whole and in the way they operate  
25 together synergistically. So that's the story on efficiency,

1 Your Honor -- on switching; on -- I'm sorry; on the stay.

2 Now as I said, Your Honor, the second reason or the  
3 third reason we believe that a stay is inappropriate here is  
4 that it would cause real prejudice. Now you heard this  
5 morning that we've sat on our rights and that these license  
6 restrictions go back years and years and years. The switching  
7 strategy is new, and it has arisen with the pending/impending  
8 expiration of the Roundup Ready® patent. So it's -- We have  
9 not sat on our rights, Your Honor. This is -- This is not  
10 only something that's new but it's taking place as we speak.

11 The Complaint alleges that Monsanto is currently  
12 coercing ISCs to switch from Roundup Ready® 1 to Roundup  
13 Ready® 2. The Complaint alleges that they have been told they  
14 need to destroy their Roundup Ready® 1 seed lines. So before  
15 the patent expires, Monsanto's goal is to have everybody  
16 switched to Roundup Ready® 2. Roundup Ready® 1 seed lines  
17 will be destroyed. What that means is that when the patent  
18 expires, there's not going to be any possibility of generic  
19 competition certainly by the ISCs or by the ISCs as a  
20 distribution channel for other trait developers, and that's --  
21 that's ongoing. Once that happens, Your Honor, we believe  
22 that once the ISCs completely switch from Roundup Ready® 1 to  
23 Roundup Ready® 2, that that conversion will become effectively  
24 irreversible. So there is real imminent danger, Your Honor,  
25 and it's real prejudice not only to -- not only Pioneer and

1 DuPont who are going to try to sell traits, license traits to  
2 these independent seed companies, but to the public interest.

3 Now, finally, Your Honor, on the issue of separate  
4 trials, Mr. Webb said earlier that there won't be two trials  
5 of the antitrust claims in this case no matter -- no matter --  
6 there will not be two trials of the --

7 THE COURT: Patents?

8 MR. DENVIR: -- inequitable defense in the *Walker*  
9 *Process*. If Monsanto is willing to waive a second trial  
10 today, we'd be happy to take it, but the Courts have held that  
11 the elements of the two -- All of the facts may be precisely  
12 the same. The elements of the two are different.

13 If you look, Your Honor, at Page 6 of this outline,  
14 the heading is "Bifurcated Trials Is Redundant." We cite the  
15 *Climax Molybdenum v. Molychem* case which is at 414 F.Supp. 2d,  
16 1007. This is the law generally, but this is a clear  
17 articulation of the law. In rejecting bifurcation, the Court  
18 held that, "Bifurcation would result in duplication and  
19 inefficient use of judicial resources. Although there is  
20 considerable overlap between the issues of inequitable conduct  
21 and the fraud necessary to establish a *Walker Process*  
22 antitrust claim, the elements are not identical. Thus, if  
23 Molychem were to prevail on its defense on inequitable conduct  
24 during a separate trial of the patent issues, no issue  
25 preclusion would result from that determination. A subsequent

1 trial of Molychem's *Walker Process* counterclaims would require  
2 another evidentiary presentation about Climax's alleged fraud  
3 on the Patent Office. In this case, a single trial of the  
4 patent and antitrust issues would promote the objectives of  
5 efficiency and fairness."

6 We would suggest that the same is true here,  
7 Your Honor. Not only is there a large overlap but the factual  
8 issues, the evidence is virtually the same; the same  
9 witnesses, same documents. And if we prevail on our  
10 inequitable conduct claim, I bet you almost anything that  
11 Monsanto is going to come in the next day and say, "Well, wait  
12 a minute. We get a new trial on the antitrust claim because  
13 the standards are different," and they are. So if we prevail,  
14 Your Honor, we're going to have two trials. There's no  
15 question about it.

16 I assume there's no more dispute about whether we get  
17 a jury trial on the inequitable conduct claim because that is  
18 absolutely clear law. So what we end up having potentially is  
19 not a savings but we have -- we have two virtually identical  
20 trials before two different juries on the same factual issues.  
21 I would suggest to Your Honor that that is not a model of  
22 efficiency. It's a prescription for inefficiency and waste  
23 and delay. And if the Court would want -- If there's a way  
24 for the Court to guarantee that this case will stay on its  
25 docket for a very, very long time, the way to do that is to

1 order a stay and bifurcation because that -- there are some  
2 things in this case that we are not going to be able to avoid  
3 regardless of whether Monsanto or DuPont, Pioneer prevail on  
4 these issues. So we may -- we may simplify things in the  
5 short term. I can't say that that's not the case, but we're  
6 not going to avoid anything. And as I said, Your Honor,  
7 that's -- that's a prescription for inefficiency and waste and  
8 waste of judicial resources.

9 THE COURT: A couple of things. One thing you didn't  
10 talk about, and I'm not suggesting it was oversight, but one  
11 concern I do have is the issue of -- of -- I'm already trying  
12 to fix in my mind what the jury instructions would look like  
13 with one case as opposed to two and, obviously, from my  
14 standpoint, it would be a lot easier to simplify it. However,  
15 many of your arguments are persuasive, so I haven't yet sorted  
16 it out.

17 Before we came out today, I thought I had a solution  
18 to this problem, and that was -- What I intended to do was to  
19 tell you to at the conclusion of the arguments, if I were not  
20 persuaded to the contrary, would be that the discovery would  
21 be wide open; no stay of discovery. We would schedule the  
22 patent case and the inequitable conduct trial, and then you  
23 would know right at this time. When we do the Case Management  
24 Order three months later, four months later, something like  
25 that, we would schedule the second trial.

1           And part of what you say would be facilitated by  
2           doing that in terms of not foreclosing all of the facts you  
3           would need for your inequitable conduct issues, but I'm still  
4           not convinced exactly what I'm going to do.

5           But what would your view be if some kind of a  
6           procedure like that would be adopted? And then I'll hear from  
7           Mr. Webb in a moment.

8           MR. DENVIR: Your Honor, I think -- I guess I'll go  
9           back to my initial point which is what we think the Court  
10          ought to do here is, as the Court is apparently inclined, to  
11          allow discovery to go forward but to leave open the option of  
12          trying both sets of issues at least before the same jury.

13          Now if Your Honor looks at the *C.R. Bard v. 3M* -- *M3*  
14          case we cited in our brief, the Court there did something  
15          which I thought was fairly innovative. It had the same jury  
16          consider the patent and the inequitable conduct issues and the  
17          patent misuse issues and the antitrust issues, but it had that  
18          jury just consider those issues in stages and respond to  
19          special verdict forms at the end of each presentation of  
20          evidence. So if there was a single jury, if the claims were  
21          tried together, but the Court ordered the evidence in such a  
22          way that it really streamlined the case, avoided the issue of  
23          jury confusion, and allowed the antitrust Plaintiffs to -- to  
24          present their evidence in a way that the Supreme Court says we  
25          should be able to present it, which is as an integrated whole,

1 to have the same jury consider all of the evidence.

2 So what I would suggest, Your Honor, is that, again,  
3 we -- I would suggest we go forward with full discovery here  
4 because it's the only way to preserve that option.

5 It's also -- It will be -- It will be much more  
6 efficient by a wide measure than trying to stay discovery  
7 because we're just going to have to do it again at some point  
8 but defer on the issue of whether we bifurcate the trial  
9 because there are -- there's a lot of creativity within this  
10 courtroom, and I'm sure we can figure out ways to avoid or  
11 minimize any issues of confusion or complexity in the same way  
12 that the Court in this *C.R. Bard* case did. So that's what I  
13 would suggest, Your Honor. Thank you.

14 THE COURT: Sure. Mr. Webb?

15 MR. WEBB: Thank you, Your Honor. I understand your  
16 schedule and I'll try to be brief.

17 THE COURT: All right. That's all right. Well, it's  
18 my problem. Actually, I should have allowed more time, but  
19 I'm sorry I didn't. But if we go over a little bit, I'm sure  
20 the attorneys, some of whom are here already, will not object  
21 precipitously. Go ahead.

22 MR. WEBB: Your Honor, as far as the -- The first  
23 point that counsel made was basically one of saying, "Well,  
24 just preserve your ability to have one trial and, therefore,  
25 in order to do that, just put all the discovery on one track

1 and then decide later." And what that totally ignores,  
2 Your Honor, is our right to an efficient and hopefully  
3 reasonably quick trial on what are very simple patent and  
4 contract issues. The discovery -- The discovery on those  
5 issues is not that great. So that -- The parties are going to  
6 have a Rule 26 conference here today, Your Honor, and try to  
7 talk about the scheduling procedure, and there's no question  
8 that from the standpoint of Monsanto, we would like to get the  
9 patent and the contract case to trial in reasonable short  
10 order.

11 The amount of discovery that will be needed on all of  
12 these antitrust issues that I put on my first chart, all the  
13 market power, market definition issues, the discovery, I  
14 respectfully suggest, Your Honor, would extend discovery two  
15 or three times beyond what is going to be needed to get the  
16 discovery done on the antitrust case.

17 If you go to their chart, their chart which was No.  
18 1, their Chart No. 1, Your Honor, the honest to God truth is  
19 that the only -- the only issue in that left-hand column that  
20 needs to have discovery taken and to litigate in the -- in the  
21 patent contract case is the patent fraud issue. Every other  
22 issue is an antitrust issue that goes beyond what is needed to  
23 litigate the -- the contract and the patent issues. And so if  
24 you were -- If we were to -- If you stayed discovery on the  
25 antitrust issues and when you get done with the patent trial,

1 no one can guarantee what's going to happen, but I'm as  
2 certain as I'm standing here, it is going to moot some  
3 significant segments of that antitrust case. In fact, the  
4 whole case may go away and there will no discovery, but none  
5 of us can predict that today. But I think what's in the back  
6 of many Courts' minds when they do this is the recognition  
7 that this discovery may never have to be taken or at least it  
8 will be taken in a much more truncated way. Just -- For  
9 example, just on the issue of patent fraud in the patent fraud  
10 cases I've been involved in, that gets proven up with one or  
11 two, at the most three witnesses. That's all. That's what  
12 happens. I would -- I would be surprised if their patent  
13 fraud case has more than two witnesses in it when all the dust  
14 settles when this case gets tried before Your Honor.

15 And -- So that -- that the -- And by the way, on the  
16 issue of -- of what would actually happen and whether there  
17 will have to be two trials, I don't know what's going to  
18 happen, but here's -- Let me just -- What happens normally is  
19 that the law is pretty clear in the patent case that what will  
20 happen is that Your Honor is going to set down a jury trial on  
21 the causes of action at law that relate to the patent and  
22 contract claims. But the inequitable patent fraud issues get  
23 tried. They're under the case law of the Federal Circuit.  
24 Those issues are tried in equity but before Your Honor in a  
25 bench trial, and that's what will happen here.

1           Now once that's all resolved, whether under their  
2   *Walker Process* theory there's something left that needs to be  
3   tried in front of an antitrust case jury, we can evaluate that  
4   at the time, but that does not need to be resolved today and  
5   there's no reason to resolve it today and it may never need to  
6   be resolved. So -- And by the way, if there -- if there are  
7   two trials some day, if there are, it almost never happens but  
8   if there actually is a second trial that follows, there is no  
9   question that the discovery on that antitrust case is going to  
10   be so much narrower than -- than what is now being presented,  
11   and the trial itself is going to be so much more narrow that  
12   there will be enormous judicial efficiencies.

13           Let me now address what they call their real  
14   prejudice which is their, in effect, their concern that  
15   they're not going to be able to compete in the marketplace  
16   effectively if the antitrust trial is delayed. Let me just  
17   make sure the Court -- First of all, by the way, in any case  
18   that I've been in, when the other side tries to oppose my  
19   Motion to Stay on prejudice, they normally file some kind of  
20   affidavit. They just can't get up and make up facts. Okay?  
21   They have to -- But they haven't filed any affidavit that  
22   supports any argument of prejudice. They've waited years to  
23   bring this antitrust claim.

24           The Seed License Agreements go back to 1996, 1997,  
25   and these restrictions have been in those Agreements since

1 that time. Their own License Agreement got changed because of  
2 a settlement called the Master Settlement Agreement in '02 but  
3 that's seven years ago. So if somehow these restrictions were  
4 causing some huge anticompetitive problem for them, I can't  
5 imagine why they could possibly wait and now come into court  
6 and say, "Oh, we're going to have all this prejudice."

7 THE COURT: What they're saying is that Roundup -- in  
8 switching from the 2014 to the 2020 limitation of the patent  
9 laws by going from Roundup® 1 to Roundup® 2, that was recent.

10 MR. WEBB: And I -- But, Your Honor, if you go to  
11 their Chart No. 2 in their book, they're trying to combine --  
12 they're trying to argue that all of these restrictions are  
13 somehow connected to the switching which they say is recent  
14 which is the circle that talks about switching. But all of  
15 these stacking restrictions, all the poison pills, the  
16 germplasm, those are all licenses that existed back in 1996  
17 and 1997. And so those are not new. And so we all agree that  
18 the switching issue will get litigated in a second trial, if  
19 that ever becomes necessary, but it doesn't include all of  
20 these other restrictions which have been there for years and  
21 years and years and is not new.

22 And also, I would like to point out to Your Honor as  
23 far as any prejudice in their ability to compete, so  
24 Your Honor understands, DuPont now has a License Agreement  
25 from Monsanto. We -- They have a License Agreement. They

1 right now -- They -- They have our Roundup Ready® technology,  
2 and they are -- they are allowed to compete against Monsanto's  
3 Roundup Ready® product, and they're able to do so all the way  
4 up to 2014. Now in 2014 they're going to be able to be a  
5 competitor by stacking anything they want to stack, based on  
6 whatever restrictions there are at that time, but they'll be  
7 able to stack off the patent on Roundup Ready® and be able to  
8 compete in that marketplace. And so the idea -- The reason  
9 they haven't filed a suit before this is they've had no  
10 trouble competing against us because we didn't -- we gave them  
11 a license. They have a License Agreement now, and it's going  
12 to run up to the time that the patent expires. And they're  
13 going to be able to compete in the marketplace. And so the  
14 idea that they're going to suffer some enormous prejudice, I  
15 respectfully suggest, is just not true and it's belied by the  
16 fact that they, in fact, have not done anything to pursue any  
17 such causes of action for years under these License  
18 Agreements.

19 Let me -- Could I comment on Your Honor's proposal?

20 THE COURT: Sure.

21 MR. WEBB: As a -- If I understood your proposal --  
22 Maybe I should -- Can I repeat it?

23 THE COURT: Well, it was -- It actually was just a --

24 MR. WEBB: A thought.

25 THE COURT: -- something less than a thought maybe.

1 I don't know; not a proposal.

2 MR. WEBB: I'm sorry.

3 THE COURT: Just something that -- I was trying to  
4 sort out some kind of an accommodation that would address all  
5 of the issues of both parties so persuasively raised in  
6 their -- in their briefs, and that's all it was. It's not  
7 anything that I have in mind secretly imposing on you. I have  
8 to go back through and try to sort all of this out after  
9 hearing your good arguments, so.

10 MR. WEBB: I understand completely. Could I respond  
11 briefly --

12 THE COURT: Sure.

13 MR. WEBB: -- to what is less than your thought --

14 THE COURT: Sure.

15 MR. WEBB: -- but just an idea that you had?

16 Your Honor, the problem with putting the antitrust  
17 case discovery on the same track as the patent case discovery  
18 is that they shouldn't be on the same length of time. The  
19 patent case discovery can be done in very short order and a  
20 trial can take place. The antitrust discovery is going to  
21 take two or three times longer because of the complexity of  
22 those issues that I walked through with Chart No. 1 and,  
23 therefore, I respectfully suggest that that's not -- Well, I  
24 respectfully suggest that that doesn't solve the problem. If  
25 -- If Your Honor were to decide to go somewhat in that

1 direction, then what I would -- I guess my brief response is  
2 that the antitrust discovery would have to run out, would have  
3 to be extended a year or so beyond the conclusion of the  
4 patent discovery and that it would run out for another year or  
5 so because it's going to take that amount of time to get the  
6 discovery done. But I respectfully suggest that what in this  
7 case should happen is the same thing that happened with DuPont  
8 in the case I referred to earlier a few years ago; that the  
9 stay of discovery be granted and that separate trials be  
10 granted for the same reasons DuPont prevailed in that earlier  
11 case which is because of mootness and judicial efficiency and  
12 jury confusion.

13 And by the way, Your Honor, about instructions,  
14 there's no question if you were to take the instructions that  
15 you will give to a jury on the patent and contract claims and  
16 put them together tomorrow and then stack on top of them the  
17 enormous complexity of these -- Every time I try an antitrust  
18 case and I read over those instructions we have to give them,  
19 I wonder -- I don't know how jurors track the intricacies of  
20 those instructions, but they do the best they can. But to put  
21 those instructions on top of the patent instructions would  
22 clearly, I respectfully suggest, lead to jury confusion.

23 Thank you for your time, Your Honor.

24 THE COURT: Ordinarily this would end it, but go  
25 ahead; a brief response and then Mr. Webb will get the final

1 word.

2 MR. DENVIR: Just one minute, Your Honor.

3 On the complexity and length of discovery, there  
4 are -- there's six law firms on that side. We have at least  
5 three on our side. Your Honor, we are going to have a  
6 conference today, and we were going to propose a very  
7 aggressive schedule for both the antitrust and patent  
8 discovery, and we don't think there's any reason that they  
9 both can't be done at the same time and in a very timely  
10 manner. We have every incentive for the reasons I've stated  
11 earlier to get the antitrust issues before a jury as quickly  
12 as we can, and we will do everything we can to do that.

13 In terms of the complexity of the allegations in this  
14 case, Your Honor, the most fact-intensive, discovery-intensive  
15 allegations relate to this patent fraud issue. The rest of  
16 these issues are -- are not nearly so fact intensive. The  
17 market power, market definitions are expert issues which I  
18 think Mr. Webb said today. There's not a lot of discovery on  
19 that stuff. It's going to be mainly a matter of statistics,  
20 and experts will testify as to that, but I think there's been  
21 a -- it's been a huge exaggeration of the complexity of the  
22 antitrust case as compared to the patent case.

23 So with that, Your Honor, thank you very much for  
24 hearing us today.

25 THE COURT: Final word? Your motion. You get the

1 final word, if you want it.

2 MR. WEBB: Yes. I'm going to be very brief.

3 Your Honor, there is no antitrust case with five relevant  
4 markets and five different markets in which we're going to  
5 have to analyze the definition of the market to figure out the  
6 issue of who has market power, sort out barriers to entry.  
7 There will be economists lined up on both sides of this case  
8 until the cows come home. There is no way that I'm  
9 exaggerating the complexity. If there's only one or two  
10 relevant markets, it becomes extremely complex. With five  
11 pled relevant markets and with the number of witnesses, both  
12 fact and expert, they're going to have to address those  
13 issues, and then combine on top of it, address an issue of  
14 antitrust injury in each market. To say that that -- that I'm  
15 overstating that, I just respectfully suggest that that's not  
16 correct.

17 THE COURT: All right. Thank you. Well, thank you  
18 all for being here, and I would like to go down and actually  
19 meet some of you that I haven't met before just as a courtesy,  
20 if you don't mind.

21 (Hearing adjourned at 10:05 AM.)  
22  
23  
24  
25

CERTIFICATE

I, Deborah A. Kriegshauser, Registered Merit Reporter and Certified Realtime Reporter, hereby certify that I am a duly appointed Official Court Reporter of the United States District Court for the Eastern District of Missouri.

I further certify that the foregoing is a true and accurate transcript of the proceedings held in the above-entitled case and that said transcript is a true and correct transcription of my stenographic notes.

I further certify that this transcript contains pages 1 through 44 inclusive and that this reporter takes no responsibility for missing or damaged pages of this transcript when same transcript is copied by any party other than this reporter.

Dated at St. Louis, Missouri, this 3rd day of September, 2009.

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/s/ Deborah A. Kriegshauser

DEBORAH A. KRIEGSHAUSER, FAPR, RMR, CRR

Official Court Reporter